THE UPDATE

T&HW LAW PRACTICE • AMALAN GUAMAN

The Quarterly Law Bulletin of TAY & HELEN WONG Law Practice

Q2 of 2023 (April - June 2023) PP16300/03/2023(033194)

TABLE OF CONTENTS		Page

Published on 17 July 2023

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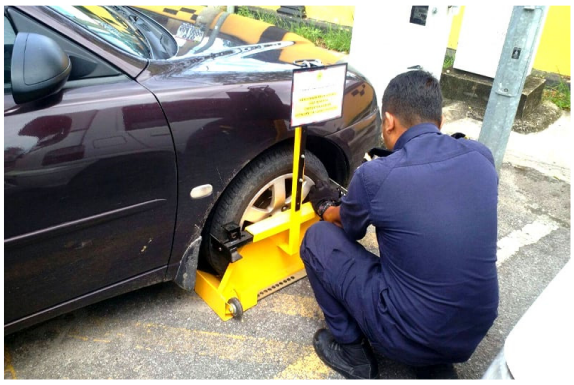
LOCAL AUTHORITY MPKB HAS NO POWER TO CLAMP VEHICLES ILLEGALLY PARKED AT PARKING LOT

The decision of the Court of Appeal in *Nursyafawati binti Kasim v Majlis Perbandaran Kota Bharu Bandar Raya Islam*[i] attracted much attention when it made headlines in national dailies[ii]. It is this. The act of the local authority in Kota Bharu, Kelantan (MPKB) in clamping the vehicle of an offender who had parked her vehicle in a designated parking area for failure to make requisite payment of parking charges after the parking period had lapsed was ruled as wrongful and *ultra vires*.



The provision pursuant to which MPKB had acted was rule 17 of the Perintah Pengangkutan Jalan (Letak Kereta Bermeter) Majlis Perbandaran Kota Bharu 2000 (Perintah MPKB) which provides as follows:

> "17. *Kereta motor boleh ditahan daripada bergerak*
>
> *(a) Apabila sesebuah kereta motor diletak dengan melanggar mana-mana peruntukan perintah ini maka atendan kereta atau sesiapa yang diberi kuasa bagi maksud itu oleh Yang Dipertua bolehlah menahan kereta itu daripada bergerak dengan merantai dan menguncinya dengan menggunakan sesuatu alat yang difikirkan patut ... Atas permintaan dan dengan syarat tuan punya atau orang yang menjaga kereta motor itu membayar kepada Majlis Perbandaran Kota Bharu sejumlah bayaran yang tidak lebih daripada tiga ratus ringgit, rantai dan kunci itu bolehlah ditanggalkan dan melepaskan kereta tersebut.*"

The said rule 17 was a subsidiary legislation enacted pursuant to s.72 of the Road Transport Act 1987 (RTA) which was the main legislation that provides power to the local authority to make rules relating to car parks and stops. Upon scrutinizing the entire s.72, there was no provision that allowed the local authority to make any provision on clamping of vehicle wheels for the offence of parking a vehicle in a car park area where payment for the parking had lapsed. There was indeed nothing in s.72 of the RTA which allowed clamping of vehicle wheels of anyone who had breached the rules made pursuant to s.72. Therefore, the said rule 17 was *ultra vires* s.72 of the RTA.

There was s.66(1)(rr) of the RTA which gave power to the Minister of Road Transport to enact a provision for, among others, the use of wheel clamp, the method and the fees charged concerning the offence of certain vehicles. However, MPKB failed to adduce any evidence of the *Gazette* to state that the Minister had given power to it to perform the obligation. Thus,

[i] [2023] 4 AMR 437
[ii] See media on 8 December 2022.

MPKB's argument that the said rule 17 was enacted and enforced by way of a rule under s.66(1)(rr) of the RTA was baseless.

Lastly, s,48(2) of the RTA empowered the local authority to clamp vehicle wheels to root out car owners who leave their cars arbitrarily which could cause danger, obstruction or unreasonable hindrances to other road users. However, the definition of the word "road" contained in s.48 and the heading of s.48 which read as "Obstruction by vehicle on road" made the appellate court to hold that the offence under s.48 of the RTA was not applicable to car parks and to the facts of the case.

Whether this decision applies to the local authority of other cities or towns in Malaysia will depend on the contents of the rules or order of the respective local authorities --- does it suffer similar defects or flaws as in the case of Perintah MPKB?

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ADMINISTRATIVE LAW

DON'T BLAME THE PURCHASER, BLAME THE DEVELOPER'S LAWYER

In *Teoh Kok Seng v Heesland Sdn Bhd & Anor*[i], A had executed a sale and purchase agreement (SPA) for the purchase of a house from the developer. The SPA was dated 2.5.2017. The purchase was partially financed by a loan facility from a bank (financier). The loan documentation was prepared by the developer's lawyers on 2.5.2017 on which date the developer issued to the financier its progress billing for the disbursement of RM530,000 which allegedly fell due on 26.5.2017. The loan documentation was only submitted to the financier on 12.5.2017 which refused to execute and returned the same to the developer's lawyers on 24.5.2017 as the land search given to it by the developer's lawyers had expired. The appropriate search was thereafter only sent to the financier on the last day on which the progress billing fell due. As a consequence, the loan could not be disbursed within the time set i.e. 26.5.2017. This was exacerbated by the delay between Lembaga Hasil Dalam Negeri issuing the notice of assessment and the payment of the stamp duty on the instrument of transfer by the developer almost one month later. The developer subsequently claimed late payment interest (LPI) against A notwithstanding that the delays were caused by its lawyers.

The Tribunal for Home Buyers Claims agreed with the developer's imposition of the LPI. A's judicial review application was dismissed at the High Court. Fortunately, the Court of Appeal allowed A's appeal. In the view of the appellate court, a sensible person who had applied his mind to the facts and involvement of the developer's lawyers would have never blamed A for any of the delays occasioned that were beyond A's control, bearing in mind that the developer's lawyers were acting in the representative capacity of the developer and not A or the financier. The delays by the developer's lawyers as agents of the developer were also the delays of the developer as principal. The fault or liability for the delay was therefore an issue exclusively between the developer and its lawyers and could never at any point in time be attributed to A. It was irrational in the circumstances for the developer to have imposed LPI against A for the delay that the developer itself and its lawyers had caused. Further, the possible procedural propriety of the LPI demand

[i] [2023] 5 MLRA 1

was not discussed by the High Court or the Tribunal. Thus, the High Court's decision and the Tribunal's impugned award had fallen into an appealable error. A's appeal and judicial review application were allowed and the award was set aside with costs.

With due respect, the developer's contention made sense, in that the firm of the developer's lawyers was only acting for the developer in the preparation of the SPA but acting for the financier in the loan documentation process. The appellate court's finding however was that it was plain and obvious that the same firm of solicitors was appointed by the developer to see to the successful sale and purchase of the property (which included both the preparation of the SPA and the loan documentation). Neither A nor the financier had any option to choose which firm to undertake the loan (which, in our view, may not be factually correct). It was too far-fetched for the developer to make such a demarcation between "SPA solicitors" and "loan solicitors" considering that there was only one firm (already appointed by the developer) that undertook both the preparation of the SPA and the loan documentation. In our opinion, the representative capacity of the firm of solicitors is critical. For the loan transaction or loan documentation, it is without any disrespect untenable proposition for the firm of solicitors to represent the developer or to be regarded as the developer's lawyers when the developer is not even a party in the loan transaction concerned. That said, it might be the case that both the Tribunal and the High Court had not embarked on any thorough deliberation and analysis of the representative capacity and involvement of the developer's lawyers and the process and procedures of the loan documentation as a result of which the Court of Appeal was constrained when disposing the appeal.

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ADMINISTRATIVE / LAND LAW

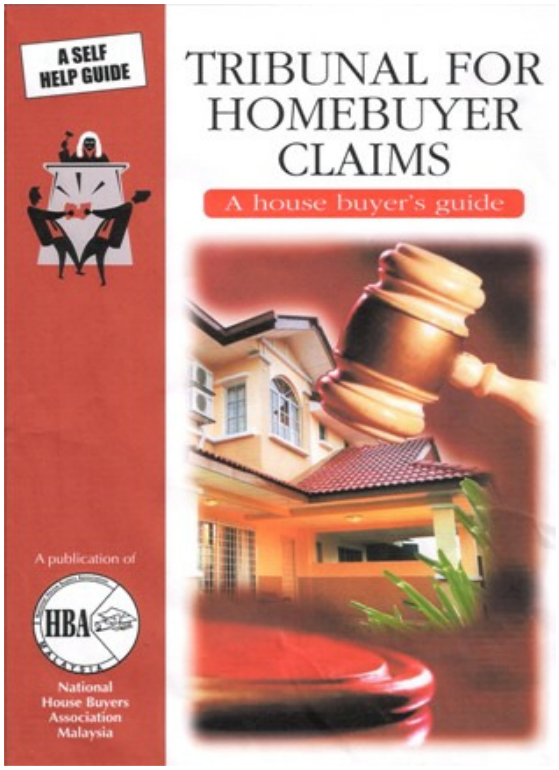
TWO SEPARATE AND DISTINCT CLAIMS; EACH CLAIM LESS THAN RM50K LIMIT

It is indisputable that the Housing Development Act 1966 (the HDA 1966) was enacted as a piece of social legislation to protect house buyers which have purchased housing accommodation from housing developers. The Tribunal for Homebuyer Claims (the Tribunal) has been established to adjudicate claims lodged by a house buyer for any loss suffered or any matter concerning his interests as a house buyer under the HDA 1966. The objective is to provide for an easier, cheaper and quicker avenue for aggrieved house buyers to claim compensation from the housing developers. The jurisdiction of the Tribunal was set out in s.16M of the HDA 1966 which is to determine a claim where the total amount in respect of which an award of the Tribunal is sought does not exceed RM50,000.00. Under s.16Q of the HDA 1966, an aggrieved house buyer is also not able to split his claims nor bring more than one claim in respect of the same matter against the same party for the purpose of bringing such claim within the jurisdiction of the Tribunal. The proper meaning and interpretation to be accorded to these two provisions were the issues before the Federal Court in the case of *Remeggious Krishnan v SKS Southern Sdn Bhd*[i].

The appellant in *Remeggious* was the purchaser of a unit of apartment (property) from

[i] [2023] 1 AMR 829

the respondent which was a developer of a residential project. The appellant filed two separate claims with the Tribunal: (i) a non-technical claim grounded on the breach of the manner of delivery of the property with the claim amounting to RM49,832 ; and (ii) a technical claim grounded on the failure of the respondent to provide adequate ceiling height and protruding beams and pillars with the claim amounting to RM40,000. One of the issues was in view of ss. 16M and 16Q of the HDA 1966, whether there was jurisdiction for the Tribunal to hear two separate claims in respect of the same subject property where the total amount of dispute of these two claims exceeded the monetary jurisdiction of RM50,000.



The Federal Court disagreed with the interpretation given by the Court of Appeal that the words 'same matter' in s.16Q meant that the claims filed by the appellant must refer to the same matter, that was, the property. That interpretation was incorrect. If it was the intention of the Parliament for the 'same matter' to mean 'the same property', the drafters of the legislation would have used the term 'property' or 'housing accommodation'. Thus, the words the 'same matter' could only mean the same issue or type of claim and not the same property. In the present case, there were two different matters *i.e.* one was for technical matter and the other was for non-technical matter. As such, there was no violation of s.16Q. The appellant may file split claims in respect of different and distinct matters.

The next issue was whether the total amount of the combined claims may not exceed the monetary jurisdiction of the Tribunal of RM50,000 in s.16M of the HDA 1966. The monetary jurisdiction of s.16M only applies to 'a claim' and not 'all the claims'. Thus, s.16M did not limit the appellant's two separate and distinct claims to a combined amount lesser than RM50,000. As long as each of the claims in respect of different and distinct matters did not exceed the monetary jurisdiction of the Tribunal, there was no violation of s.16M of the HDA 1966.

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APPEAL UPDATE

RUBBER TREE AS PART OF THE LAND – APPEAL UPDATE

In issue Q1 of 2023, we had featured the Court of Appeal decision in *Abdul Latif bin Putch & Ors v*

Pentadbir Tanah Jajahan Pasir Mas & Anor[i] under the heading "Rubber Trees as Part of the Land". However, the above decision had been over-ruled by the apex court in *Abdul Latif bin Puteh & Ors v Pentadbir Tanah Jajahan Pasir Mas & Anor* reported in [2023] 1 MLJ 330.

The Federal opined that on the pleaded facts and circumstances including the restrictions and conditions of the Land (Group Settlement Areas) Act 1960, the appellants/participants of the FELCRA scheme had a reasonable cause of action which merited proper determination in a full trial and hence, the matter ought not to have been summarily disposed of. As pointed out in our write-up, the main issue was whether the appellants had any legitimate interest in the rubber trees that they had cultivated over the undisturbed 30-year period. It was held that in the circumstances surrounding the parties, that issue gave rise to the 4 questions of law that required determination by the High Court. The appeal was allowed and the matter was remitted to the High Court for a full trial.

[i] [2022] 6 MLJ 569

[ii] [2023] 3 CLJ 309, decision was delivered on 3 February 2023

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CONTRACT (MONEYLENDERS)

1. CREATIVITY TO AVOID STRICTURES OF MONEYLENDING LAWS

A moneylending transaction camouflaged as a sale and purchase transaction was struck down again in *Lay Wan Yeow & Anor*[ii] *v Chin Kok Soon & Anor*. One will recall that in an earlier case, *Tang Lee Hiok & Ors v Yeow Guang Cheng*[iii], the Court of Appeal on quite similar facts ruled against the alleged 'purchaser'. In *Lay Wan Yeow*, a sale and purchase agreement (SPA) signed at a legal firm was used to mask a moneylending transaction with the property transferred through Form 14A at a purchase price of RM210,000.00 with a deposit of RM150,000.00 when the sum loaned out was RM132,354.00. Redemption sum of RM46,048.8 was made to CIMB Bank Bhd to redeem an existing charge over the property.

The Court of Appeal disagreed with the findings and decision of the High Court. Several discrepancies were pointed out by the appellate court. The amount of deposit was never received by the plaintiffs in full. They only received RM132,354.00, not the full purchase price. The cheque said to be issued by the 1st defendant in the name of the plaintiffs was never presented to the bank. The WhatsApp conversations showed elements of loan transaction with a breakdown of the loan amount and deduction of interests. The SPA was materially different from what is found in normal conveyancing practice. No caveat was entered by the 1st defendant over the property; and vacant possession was not claimed

[iii] [2022] 5 MLJ 584, decision was on 15 July 2022

by the 1st defendant after full payment of the balance purchase price. It was only after the suit was filed that the 1st defendant made such claim. It was concluded that the SPA was a sham to mask the illegal moneylending transaction. It is pertinent to note the message:

> *"Because of the strict requirements of the law on the need for a licence to conduct moneylending business and the burden to rebut the presumption*[i]*, the unlicensed moneylenders sometimes come up with creative solutions to avoid the laws using other legal instruments such as the SPA. The courts must be vigilant and be alert to the use of creative contractual devices to overcome the strictures under the moneylending legislation."*

The court thus allowed the appeal, declared all the transactions between parties as void and ordered the property to be returned to the plaintiffs.

2. DECISIONS THAT FAVOURED THE IMPUGNED TRANSACTIONS AS NOT VIOLATING THE MLA

However, in the period between *Tang Lee Hiok* and *Lay Wan Yeow*, there were at least 3 decisions from the Court of Appeal (COA) which legalized the transactions concerned.

(i) The first was *APE Electrical Sdn Bhd v Chandra Segar a/l Marullamulth & Anor and another appeal*[ii] decided on 21 September 2022 where the plaintiffs had obtained a loan from two moneylenders with properties pledged as security subject to interests payable at 6% per month. The documents were apparently not loan documentation as allegedly represented but sale and purchase agreements (SPAs) in favour of the 1st defendant. The trial Judge ruled that it was a money-lending transaction but this was set aside by the COA. The factual basis for the trial Judge's finding was held to be misconceived. Then there was the plaintiffs' failure to call a material witness on demand for interest payment which ought to have invoked the adverse inference in s.114(g) of the Evidence Act against the plaintiffs. The trial Judge also had misread the recital of the SPAs and failed to give due weight to facts. In the context of the Moneylenders Act 1951 (the MLA), the appellate court had this to say :-

> *"While we appreciate the provisions of the MLA that proof of a single loan at interests shall raise the presumption of moneylending business by the lender, it is trite law that proof of carrying on a*

[i] The Moneylenders (Amendment) Act 2011 had introduced s.10OA which read: "Where in any proceedings against any person, it is alleged that such person is a moneylender, the proof of a single loan at interest made by such person shall raise a presumption that such person is carrying on the business of moneylending, until the contrary is proved."

[ii] [2023] 1 MLJ 557

moneylending business requires evidence of some degree of system and continuity in a moneylending transaction which was absent in the present case."

Further, it was never the plaintiffs' pleaded case that the 1st defendant was a moneylender. The primary premise of the plaintiffs' claim that the SPAs executed in respect of the properties with the 1st defendant was sham moneylending transactions was on the totality of evidence clearly not established. The SPAs were genuine and valid.

(ii) The second was *Sureshraj a/l Krishnan v PV Power Engineering Sdn Bhd & Anor*[i] decided on 2 November 2022 where the appellant (A) and the respondents (R) had entered into a project support agreement (PSA) for the funding of a project awarded to R1. R2 a director in R1 stood as a guarantor under the PSA. A lent RM500k to R1 and R2 as project support sum for a period of 6 months and in the event R breached the PSA, A was entitled to claim interest at the rate of 8% on daily basis until full repayment. The High Court held that the PSA was an illegal moneylending transaction. On appeal, it was held that R had failed to prove that A had carried on or advertised or announced himself or held himself out as carrying on the business of moneylending as a moneylender. The fact that A lent money to R did not make him a moneylender under the MLA. The PSA was in reality a friendly loan agreement not disguised as a contract for private funding support. Interestingly, on A's pleaded claim for interest at 8% per day, the appellate court accepted that it was a mistake to claim such exorbitant interests but A was entitled to abandon his claim during the trial. Consequent to A dropping his claim, the interest clause was severed from the PSA and hence, the PSA was a friendly loan agreeme

(iii) The third was *Triple Zest Trading & Suppliers Sdn Bhd & Ors v Applied Business Technologies Sdn Bhd and another appeal*[ii] decided on 26 January 2023 where R had granted a 'friendly loan' of RM800,000 to A1 which required funds for its business subject to repayment together with another RM800,000 as 'agreed profit'. A1 also deposited with R as collateral the title deeds to two parcels of land, 4 undated cheques each for the sum of RM400,00 and personal guarantees by A2 and A3. Upon the suit filed by R to recover the loan that A1 had defaulted to repay and agreed profit, A raised the defence of illegal moneylending transaction. The High Court decided in favour of R. On appeal, the COA set aside the High Court decision and substituted it with judgment against A in favour of R for the sum of RM800,000 only together with interest thereon at 4% p.a. from the date of the High Court decision until full payment. It was held that R had adduced sufficient evidence to rebut the presumption under s.10OA of the MLA. The evidence of SP1 that R was in the business of [iii]information technology was not disputed by A. There was no sufficient evidence that R was engaged in the business of moneylending nor any evidence that R had loaned money to borrowers in the past. A had thus failed to prove that R was an illegal moneylender. This was a case of a friendly loan between R and A1; ss 5(1) and 15 of the MLA were inapplicable and did not invalidate the friendly loan agreement between parties. In the case of a friendly loan as in the present case, no interest ought to be charged. Thus, a judgment was entered for the principal sum of RM800,000 together with interest

[i] [2023] 1 MLJ 632
[ii] [2023] 2 MLJ 374

thereon at 4% p.a. R was ordered to return the land titles to the registered owners.

CONTRACT

LIMITATION OF LIABILITY FOR MIS-DELIVERY BY COURIER SERVICES COMPANY

Liability of a courier services company was the subject matter in the case of *TNT Express Worldwide (M) Sdn Bhd v Mega Security Devices (M) Sdn Bhd*[i]. P had utilized D's courier services to send 2 packages of goods weighing 7.47kg (the goods) to their customer in Macau. However, the goods were not sent within the stipulated time ie. on 27.3.2017 and wrongly sent to Dubai. On a claim for negligence against D, the High Court held on appeal that the terms and conditions that P had accepted at the time P executed the consignment note regulated the contract between the parties. The fact that the terms and consignment note did not specify a time for delivery did not mean that the time to deliver was at large. Delivery was to be made within a reasonable time and to the proper address but that was not done. The tracking of shipment where the estimated delivery was before 6pm on 27.3.2017 was sufficient to cast an obligation upon D to deliver the goods to the intended addressee by 27.3.2017 or 31.3.2017 the latest. D was thus negligent when it did not deliver the goods to the intended addressee by the end of March 2017.

D's liability was however limited by virtue of the agreed terms and conditions. Clause 12(1)(a) provided that even if the Warsaw Convention and Montreal Convention were inapplicable, D's liability for loss, damage, mis-delivery or non-delivery of any shipment was limited to 17 Euros per kg up to a maximum of 10,000 Euros per shipment. Since the consignment note stated the package weight as 7.47kg, D's liability was 126.99 Euros or RM578.94 upon conversion. The Sessions Court's finding on negligence against D was therefore affirmed but his award of RM892,092.00 was substituted with an amount of RM578.94.

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CONTRACT/TORT

IT PAYS TO VIGILANTLY CHECK BANK STATEMENTS

D1, an accounts executive employed by P had conspired with her husband (D3), her brother (D2) and his wife (D4) and her sister (D5) to forge the signatures of P's authorized signatories on the 79 letters of instructions (LOIs) to fraudulently siphon off P's monies in the current account in the sum of RM31.9 million and also to dissipate, conceal and wrongfully retain the monies over a seven-year period. P sued D1 to D5 and the bank (D6) to recover the said sum. The claim against the bank was for the breach of contract, negligence and/or tort of conversion in

[i] [2023] 7 MLJ 284

honouring and making payment on the 79 forged LOIs. At the inception of the relationship, however, P and the bank had executed a letter of indemnity (LI).

Those were the brief facts in the case of *TSA Industries Sdn Bhd v Teoh Lai Kin & 5 Ors*[i]. D1 to D5 (of whom, D1 and D3 were serving prison sentences) chose not to participate in the trial which resulted in a finding that the forgeries of the 79 LOIs and the alleged conspiracy had been proven.

Unfortunately, P's claim against the bank was disallowed. The terms of the LI appeared to have rescued the bank. Under the LI, P had agreed, among others, that the bank did not owe any duty to P to enquire into the authority of the person giving or purporting to give the instructions or to enquire into the genuineness or authenticity of the instructions given by P by way of telephone, facsimile or any other form of electronic communication; and the bank was entitled to treat and rely upon the notice instructions or communications sent by P as fully authorized and binding upon P. The bank had processed and approved the LOIs after a visual comparison of signatures on the LOIs against the specimen signatures. That was sufficient in the finding of the trial Judge who had held that the bank's duty of care was limited to the standard and extent as laid down in *Lipkin*[ii] and *Quincecare*[iii] and the terms in the LI. The bank did exercise reasonable care and skill in checking and verification of signature of each LOI and had no duty to take any further step to investigate the genuineness of a signature which, on the face of it, purported to be the signature of the person named in the LOI, as admitted by P. The bank was not under further duty to verify the signatures on the faxed LOIs with the originals or with the previous LOIs or to make verification calls. Thus, P's case in breach of contractual duty and negligence failed.

The P's claim under the tort of conversion (strict liability of a bank which had made payment on forged instruments of its customer) was established. However, the bank successfully raised *estoppel* against P. Firstly, based on the principle that a principal is liable

[i] [2023] 3 AMR 297

[ii] *Lipkin Gorman (a firm) v Karpnale Ltd [1992] 4 All ER 331*

[iii] *Barclays Bank Plc v Quincecare Ltd & Anor [1992] 4 All ER 363*. See also *Abdul Rahim b Abdul Hamid & Ors v Perdana Merchant & Ors [2006] 5 MLJ 1*

for the fraud of his agent acting within the scope of his duty, whether the fraud was committed for the benefit of the principal or the agent, DI's fraudulent knowledge and conduct were to be attributed to P so as to preclude its claim against the bank.

Secondly, by virtue of the contractual term requiring P to check its statements and by P not having notified the bank of any inaccuracy or incorrect debit in the account within the time as required by that banking contract, P was precluded from claiming that the LOIs were forged. By failing to challenge the debits shown on the bank statements, P had represented to the bank that the debits had been correctly made. The bank had acted in reliance upon P's representations so made and continued to expose itself to the risk of paying out on the forged LOIs.

Thirdly, the terms of the LI enabled the bank to act upon the LOIs received via fax without further inquiry and to treat the same as fully authorized and binding upon PO and to effect payments and P would indemnify the bank of any loss, damage, expenses and liabilities incurred as a consequence of the bank's action in accepting and acting upon such instructions. The LI was valid and enforceable to exonerate the bank from liability for P's losses

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COURT PROCEDURE

DON'T RESERVE YOUR BULLETS IN LEGAL SUIT; IT MAY HAUNT YOU LATER

A litigant cannot reserve or withhold an issue of law or cause of action to be raised in a future action. This will run foul of the doctrine of *res judicata*. That was the fate of the plaintiff (P) in the case of *Ravindra K Karuppiah v CIMB Bank Bhd & Anor Appeal*[i]. P was the administrative of the estate of her late husband whose house was charged to the Defendant bank (bank). There was still an outstanding balance whereupon the bank instituted foreclosure proceedings naming P as the respondent (the Charge Action). P did not intervene to challenge the issuance of the order for sale. A public auction was held where one Ong successfully purchased the house. P subsequently filed a writ action (Suit 723) to set aside the order for sale. The bank succeeded to strike out the Suit 723. P did not appeal. However, P commenced another suit against the bank and Ong (the Present Suit). Upon applications by the bank and Ong, the High Court struck off the Present Suit on the ground of *res judicata*. The Court of Appeal affirmed the decision.

P sued the same parties in the Present Suit as in Suit 723. The principal relief was the same, i.e. to nullify the order for sale and the auction sale. The plea of illegality was raised in Suit 723 which mainly concerned the negligence of the bank. These issues in the mind of the appellate court clearly and unmistakably belonged to the earlier suit. Given the factual matrix of Suit 723 and the Present Suit, P was plainly litigating by instalments which was not permitted by the doctrine of *res judicata*.

In Suit 723, P ought to have raised the point of illegality, based on the case of *Badiaddin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd*[ii], that because the order for sale was illegal for non-compliance with substantive law[iii], the doctrine of *res judicata* did not prevent her from

[i] [2023] 5 CLJ 971
[ii] [1998] 2 CLJ 75
[iii] Non-compliance with O.15 r. 6A of the Rules of Court 2012 and s.413A of the National Land Code

challenging it collaterally in separate proceedings. P however did not do so. The point on the illegality issue clearly belonged to and was part of the earlier proceedings. Thus, the doctrine of res judicata barred P from prosecuting a matter that had already been adjudicated twice *ie*. in the Charge Action and Suit 723.

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DAMAGES

AGGRAVATING FEATURES WARRANTING AGGRAVATED DAMAGES

In a case of personal injury, the injured person is entitled to general damages for pain and suffering, loss of amenities of life, hardship, discomfort and mental distress. Such non-pecuniary compensatory damages are made up of (a) basic damages; and (b) aggravated damages. In *Irwanbudiana Amsah (suing as the Administrator of the Estate of Muhammad Uwais Irwanbudiana, deceased) v Government of Malaysia*[i], the deceased suffered severe brain damage after his delivery at the hospital belonging to the 1st defendant and passed away at the age of 5 years and 7 months. The plaintiff as the administrator of the deceased's estate sued for medical negligence.

The High Court in Tawau awarded a sum of RM250,000 as general damages for pain and suffering and loss of amenities which the deceased had endured for 5 years and 7 months until his untimely death. There were also aggravating factors that resulted in the plaintiff/deceased not receiving sufficient compensation for the injury suffered if the award was restricted to basic damages and hence an award of aggravating damages[ii]. In the instant case, the long delay of over 2.5 years in admitting liability, refusal to make voluntary disclosure of medical records causing the cause of action in negligence to be concealed and the filing of the claim delayed by a few years and the way the defence was pleaded and trial conducted were the aggravating features that justified in awarding a sum of RM300,000 as aggravated damages.

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DIGEST OF EMPLOYMENT LAW

INFLATED TIMESHEET

In *Germanischer Lloyd Industrial Services Asia Sdn Bhd & Ors v Raza Amin & Anor*[iii], the claimant was the country manager of the company which was the senior-most managerial position. It was found that some employees under his watch had for several months inflated their timesheet recordings which caused the company to overcharge its clients in two projects. Despite him being alerted, he did nothing to stop the

[i] [2023] 1 MLJ 175

[ii] It must be made clear that such type of damages is not intended to punish the party claimed against.

[iii] [2023] 1 MLJ 175

practice. Disciplinary action was taken against him which resulted him to be demoted to the position of senior principal consultant which was a grade lower but without any change in his basic salary. The claimant considered his demotion as a constructive dismissal and filed a representation for unlawful dismissal.

The Industrial Court found in favour of the claimant which decision was overturned by the High Court. However, on appeal, the Court of Appeal reinstated the decision of the Industrial Court. It was more probable that the claimant was aware of the inflated timesheets practice by his personnel since February 2015. Further, on another issue of recruitment of a staff, evidence showed clearly that the claimant had not disclosed the fact that he and his wife knew the staff well and that it was the claimant who had forwarded the staff's curriculum vitae to the human resources manager and also signed off on the decision to recruit him. The claimant's dismissal was not disproportionate or too harsh. Despite the severity of the offence, the re-designation to the most senior technical position without any change in his basic salary was reasonable.

RIGHT ENTITY TO ISSUE SHOW CAUSE LETTER

It is vital for the right entity which is the proper employer to initiate disciplinary proceedings and issue show cause letter including notice of termination to the employee concerned. In *Ismail Othman v Seacera Properties Sdn Bhd*[i], the claimant had begun his employment with Seacera Group Berhad (SGB). 9 years later, he was transferred to Seacera Properties Sdn Bhd (SPSB) as the Project Director cum Advisor. SPSB is a subsidiary of SGB. 4 years later, he was put on a fixed two-year contract with SPSB. In September of the same year, he was issued with a show cause letter from SGB containing three allegations of misconduct and was suspended from his duties. The claimant had responded by stating that the contents of the show cause letter had been invalid, that since SGB had not been his employer, he had not been under any obligation to respond to it and had carried on with his duties, without any objection from the company. Another letter was issued to him that he had violated the instructions in the show cause letter by attending work without permission. A domestic inquiry was subsequently convened which found him guilty of the charges against him and he was dismissed. The Industrial Court ruled in his favour. It had been unlawful for SGB to engage in the disciplinary and dismissal process. The claimant's employer was never SGB but SPSB. In addition, SGB's actions against him were in respect of the conduct undertaken by him as a director of another entity, Duta Skyline Sdn Bhd. Such matters ought never to have been brought into the employment sphere in the company

[i] [2023] 1 ILR 93

NON-*BONA FIDE* RETRENCHMENT

Wrongful dismissal claims brought by two employees against the same company on the ground of non-*bona fide* retrenchment exercise were heard together in *Rusdi Jalil v Flowco (Malaysia) Sdn Bhd*[i] and *Mohd Khair Mohid v Flowco (Malaysia) Sdn Bhd*[ii]. Both the claimants were retrenched from their employment by the company due to redundancy arising from the restructuring exercise of its business. The company claimed that it had embarked on the retrenchment exercise due to a slowdown in its business since 2019 as exacerbated by the COVID-19 pandemic with no profits made for the year 2019 and 2020 which necessitated the company to re-organize its business.

The common findings of facts in both cases are these. The financial reports of the company showed that it had performed better in 2020 despite the COVID-19 pandemic and thus, the pandemic should not have been raised to justify the retrenchment. The job of the claimants continued to exist in the company but the company proceeded to remove the claimants in both cases from employment and assigned their job to another officer who was more junior. The court opined that if poor performance and disciplinary issues were the real reason, the company ought to have dealt with such issues separately and not use retrenchment as guise to dismiss them. Further, the mere acceptance of the letter of retrenchment by the claimants did not in any way absolve the company from its duty to demonstrate that the retrenchment due to redundancy was a *bona fide* exercise of the company to re-organize its business.

DISMISSAL BY WAY OF RETIREMENT

Pursuant to the Minimum Retirement Age Act 2012 (the Act), the statutory minimum age of retirement is 60 years old. The claimant in *Manokaran S Mahalingam v Hiap Hoe Cranes & Engineering (M) Sdn Bhd*[iii] reached the age of 62 years and 9 months when the company issued a letter of retirement to him and required him to retire from the company in 3 months' time. The claimant's contract of employment did not stipulate any retirement age. He had served the company as a crane driver for 34 years and 8 months. He lodged a wrongful dismissal claim, contending that in the absence of any clause on the age of retirement in his contract, he could remain in employment for as long as he intended. The Industrial Court ruled in favour of the company. Even though the Act only regulated the minimum age of retirement and did not provide for a maximum age of the same, it could not be construed to mean that the retirement age could be extended beyond 60 years of age. It was an insensible and flawed proposition to state that an employee is entitled to be employed perpetually for life. In the absence of a contractual term in the claimant's contract, s.4(1) of the Act shall apply. The claimant's dismissal by way of retirement was with just cause and excuse.

NO TO VULGARITY TO DISCIPLINE EMPLOYEE

In *Jegathisvararau Ramachandran v Sem Siong Industries Sdn Bhd*[iv], the claimant was employed as a Senior Security Officer. He alleged that ever since his new superior took over as the Head of Security, the entire working environment took a drastic change. The claimant was subjected to

[i] [2023] 1 ILR 530
[ii] [2023] 1 ILR 551
[iii] [2023] 1 ILR 329
[iv] [2022] 4 ILR 604

unacceptable treatment including being directed to do work that was unrelated to his employment contract and which should have been done by his subordinates, being subjected to abusive and vulgar words and being transferred numerous times. He did write a grievance letter to the company to have the said breaches remedied but the company had responded by issuing him a stern warning instead and directing him to improve on his performance. He left the company and claimed constructive dismissal.

The Industrial Court held that the company had unsatisfactorily dealt with the matter. The company should not have dealt with his complaint in the presence of his superior. It had been for the company to clearly notify him of what his job scope had been instead of simply piling on job after job on him which jobs had not been his to perform. The company's contention that his jobs and responsibilities could change from time to time had not meant that he could be given a job that had not been suitable for him or not in line with his position in the company; and when he refused to carry out such assignment, label him as being insubordinate. The evidence showed that he had been assigned jobs that had been meant to be performed by ordinary security guards and it had invited laughter and ridicule from other employees. This clearly was intended to drive him out of his employment.

It had also failed to investigate his grievance on the abusive and vulgar words used by his superior on him. No employee can endure the use of vulgar and abusive words against them as it demeans and humiliates them. Resorting to vulgarity in an attempt to discipline or reprimand an employee should be strictly prohibited in any work environment.

The company had not only failed to adequately investigate and remedy the breaches that he had complained of but instead gone further to issue him a stern warning to improve on his performance which was unrelated to his grievance. By its actions, the company had breached the fundamental terms of his contract of employment and had evinced an intention no longer to be bound by it. The claimant succeeded in his claim for constructive dismissal.

WHO IS THE ACTUAL EMPLOYER? WHICH JURISDICTION TO HEAR THE DISMISSAL CLAIM?

Those are essentially the pivotal questions in *Ballester Antoine Philippe Louis v Sonepar South East Asia Sdn Bhd*[i]. The claimant, a French national, was employed by Sonepar SAS, France (Sonepar SAS) as the Vice President (VP) of Finance, South East Asia via an employment contract which provided, *inter alia* : (i) the claimant's primary working place would be in Paris but he may be required to go for trips in France or abroad; and (ii) the employment contract was subjected to French laws and the exclusive jurisdiction of the French court. On the same day of the employment contract, the claimant agreed for an assignment and signed an Expatriation Agreement which placed him in the branch subsidiary in Malaysia, Sonepar South East Asia Sdn Bhd (the Company). In the Expatriation Agreement, it was, among others, agreed that Sonepar SAS remained as the employer, that the Expatriation Agreement was conditional upon maintaining the employment contract and that in the event of any termination in the local contract, the employment contract would come into effect. The company issued a notice of termination due to economical reason because of

[i] [2023] 1 ILR 456

the Covid pandemic effective on 24.7.2020 with regard to the Expatriation Agreement; the claimant was repatriated to France and his employment with Sonepar SAS continued as usual and he was paid salary in France beginning on 25.7.2020.

The Industrial Court held that the articles/clauses of the employment contract and Expatriation Agreement should be read as a set of collective documents and not independent from the other. The second paragraph of Article 1 of the Expatriation Agreement expressly stated that the employment contract would be established with the host subsidiary in Malaysia i.e. the company with its main provision set out in Article 2. The claimant was paid by Sonepar SAS with effect from 27.7.2020 even though he did not report to work physically. The certificate of employment by Sonepar SAS dated 6.8.2020 confirmed that after the termination of the claimant's hosting in Malaysia, he had been on the payroll of Sonepar SAS. All in all, Sonepar SAS was the actual employer.

More significantly are Article 18 of the employment contract and Article 10 of the Expatriation Agreement in which parties had agreed to be bound by the French laws and jurisdiction of the French courts. Therefore, the Industrial Court was not seized with jurisdiction to hear the claimant's dismissal claim.

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EMPLOYMENT LAW

WRONGFUL DISMISSAL CLAIM IN CIVIL COURT IS AN ABUSE OF PROCESS OF THE COURT

In a strongly worded judgment, the Court of Appeal in *7-Eleven Malaysia Sdn Bhd v Ashvine Hari Krishnan*[i] (*7-Eleven*) appeared to have disapproved the recourse to civil courts to claim for wrongful dismissal from employment. Ordinarily, a claim for reinstatement and monetary compensation for wrongful dismissal from employment without just cause or excuse ought to be ventilated via the statutory dispute mechanism provided for under the Industrial Relations Act 1967 (the IRA), i.e. the Industrial Court. Prior to *7-Eleven*, however, a dismissed employee may elect to sue for wrongful dismissal at common law in a civil court but the remedy of "reinstatement" is not available whilst damages obtainable are restricted to the salary/wages equivalent to the contractual notice period which are rather "meagre"[ii]. The recent decision in *7-Eleven* may be construed as barring resort to civil action on such a wrongful dismissal claim.

[i] [2023] 4 CLJ 895
[ii] See *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors* [1981] 1 MLJ 251; *AETNA Universal Insurance Sdn BHd v Ooi Meng Sua* [2001] 3 CLJ 1

The plaintiff in *7-Eleven* filed a claim for constructive dismissal[i] to seek a colossal sum of RM96 million as damages for alleged breach of the employment contract representing alleged employment benefits for 20 years, damages for the tort of intentionally causing emotional distress, torts of harassment and bullying and negligence in appointing, retaining and monitoring the recruitment of employees, general damages and exemplary damages. The appellate court ruled that the tort of emotional distress was unmaintainable and allegation of negligence was not translatable into a cause of action in favour of the plaintiff. Likewise, the tort of harassment and bullying were at best "building blocks" for the claim of constructive dismissal and nothing else.

The court went on to state that it was wholly incumbent upon the plaintiff who complained that she had been constructively dismissed to invoke the statutory remedy under the IRA, instead of filing a civil action and claiming substantial damages of the types pleaded in the statement of claim. The plaintiff's common law claim in the present civil action ought to have been confined, as a matter of law, to "meagre" damages; indeed even if she succeeded, she was not entitled to such damages as on the facts, she had already been paid salary *in lieu* of notice. The colossal damages as pleaded were not claimable as a matter of law and hence her suit was struck out on the basis that the claim had no prospect of success and was an abuse of the process of the court. In other words, her suit could not even see the daylight of a trial!

Of critical importance are the following remarks of the appellate court :-

> "*...if the Parliament has put in place a statutory mechanism/process and stipulates the remedies that can be given by the statutory tribunal, then that is the process/remedy that must be pursued ...*
>
> *... As a matter of principle, if the claim is one for compensation for wrongful dismissal (loss of employment) then it is a claim which ought to be ventilated* via *the statutory dispute mechanism* ie, *Industrial Court and not the civil court. ...*
>
> *... a civil suit by a dismissed employee who chooses not to pursue the statutory dispute resolution mechanism/process under the Act and/or seek the requisite statutory remedy under the Act and who seeks instead monetary compensation for loss of employment* via *a common law action ought to be struck out as being an abuse of process of the court.*"

In brief, a common law action filed in civil court to pursue a claim of unlawful dismissal from employment runs the risk of being struck out as an abuse of process of the court.

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[i] Constructive dismissal is where an employee walked out or left the workplace or was forced or compelled or put in a situation where he had to resign from his employment.

CAN A COMPANY DIRECTOR BE A WORKMAN UNDER THE INDUSTRIAL RELATIONS ACT 1967?

In *Gopala Krishnan Chettiar a/l Muthu v Sealand Marine Inspection and Testing (M) Sdn Bhd & Anor*[i], the claimant who was appointed to the board of directors of a company claimed that he was a "workman" within the definition of the term under the Industrial Relations Act 1967 (IRA) and that he had been constructively dismissed without just cause or excuse by the company. He lodged a complaint under s.20 of the IRA for reliefs. The Industrial Court (IC) ruled in favour of the claimant but the High Court quashed the award. On appeal to the Court of Appeal (COA), the COA set aside the High Court's order and reinstated the IC's award.

The COA revisited numerous decisions of high authority to reiterate that the law in the Supreme Court decision in *Inchcape Malaysia Holdings Bhd v RB Gray*[ii] which posited in absolute terms that a company director could not be a workman under the IRA was no longer good law. It had been firmly established in cases such as *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor*[iii], *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd*[iv] and *Chong Kim Sang v Metatrade Sdn Bhd*[v] that the question whether a claimant is a "workman" was dependent on the nature, degree and extent of control of the duties and functions which were not limited to the terms of the written contract but included the conduct of the parties at all relevant times. These would determine whether the claimant was employed under a contract of service (in which event he was a workman falling under the IRA) or a contract for services (in which event he was an independent contractor out of the ambit of the IRA). Such question was a "mixed question of law and fact".

Having examined the functions of the claimant, the IC was correct to find that although he was a director/shareholder, he was nevertheless carrying out functions or duties as a workman in his capacity as "operations director". There was no evidence that he was removed as a director of the company but it was an undisputed fact that he was in fact removed/terminated – which could only mean that he was removed/terminated as an operations director i.e. as a workman. There was no position in the board of directors as "director of operations"; hence, the claimant although a shareholder and director was in reality an employee carrying out executive functions as director of operations.

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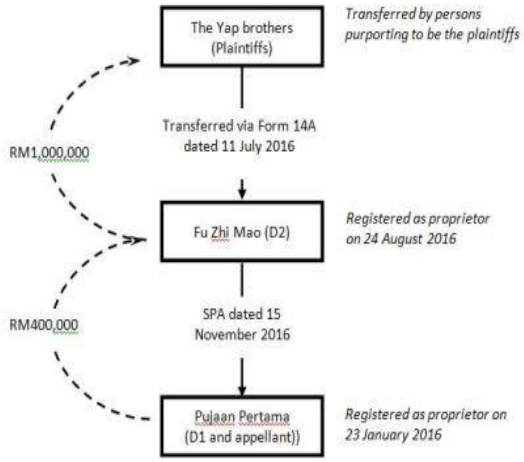
[i] [2023] 4 AMR 501
[ii] [1985] 2 MLJ 297
[iii] [1996] 4 CLJ 687, Federal Court
[iv] [1997] 3 AMR 2484, FC
[v] [2004] 3 MLJ 1, COA

DID THE PURCHASER DEAL DIRECTLY WITH THE ROGUE?

Was the purchaser of the land an immediate or a subsequent purchaser pursuant to s.340 of the National Land Code (NLC) ? This has a bearing on the decision in the Court of Appeal case of *Pujaan Pertama Sdn Bhd v Yap Lee Chuan & Ors*[i]. In June 2017, the Plaintiffs (P, ie. the Yap Brothers) found out that their land was no longer registered in their names despite the fact that they had never sold the land and the issue document of title remained in their possession. Land searches showed that the land had first been transferred by persons purporting to be P to the 2nd Defendant (D2, ie. Fu Zhi Mao) some time in August 2016 with the consideration recorded in the transfer Form 14A as RM1 million. The said Form 14A bore a signature purporting to be that of a solicitor, N. D2 then sold the land for RM400,000 to the 1st Defendant (D1) which became the registered proprietor in January 2017. The summary of dealings is depicted in the following diagram:



It was held that the Form 14A was a forgery based on the testimony of N and the supporting evidence that she had not been practicing with the firm of Khairuddin Lina Leong & Co at the material time. Further, the handwriting expert testified that the signature purporting to be that of the 2nd plaintiff (one of the three signatories for P for the Form 14A) was likely not his whereas the other 2 signatures (by 2 other plaintiffs) were so different from those of the specimen signatures that the expert could not make suitable comparison. This led to the appellate finding that there was no reason why the 2 other plaintiffs would sign differently on the Form 14A from their usual signatures and concluded that the signatures were forgeries too.

D2 did not defend the action and hence, P's claims in fraud were taken to have been proven against D2. The pivotal question was whether the current registered proprietor of the land, D1 had an indefeasible title as against P. If D1 was an immediate purchaser, its title would be tainted even if it had acted *bona fide*, paid full value for the land and possessed no notice of the prior fraud; whereas if it was a subsequent purchaser, it would acquire an indefeasible title pursuant to s.340 of the NLC. The appellate court drew guidance from Federal Court decisions particularly in *He-Con Sdn Bhd v Bulyah bt Ishak*[ii] to hold that D1 had dealt directly with the rogue, D2 which rendered the title that D1 acquired as defeasible under s.340(2) of the NLC. D1 was an immediate purchaser and could not avail itself of the proviso to s.340(3) to show that it was a *bona fide* purchaser who had provided valuable consideration and accordingly its title was indefeasible.

[i] [2023] 2 MLJ 74

[ii] [2020] 4 MLJ 662

The decision of the High Court in allowing P's claim against D1 to D3 and in directing the land to be re-registered in the name of P was affirmed.

TAX

LAND AS STOCK IN TRADE AND GAINS FROM DISPOSAL ARE TAXABLE AS BUSINESS INCOME

Is the land an asset or a stock in trade? Different answers will attract different tax treatment. That was the situation at hand in *Ketua Pengarah Hasil Dalam Negeri v Selectcool Sdn Bhd*[i]. The taxpayer was a dormant company which had acquired a plot of land from the state authority for RM600k with the sole intention of keeping it as fixed asset as a long-term investment. There was no business activity carried out and 14 years later, part of the land was sold at RM2 mil on the purchaser's conditions that the company was to sub-divide the land and to apply for planning permission to develop a service station. The remaining portion of the land was sold at RM5 mil to another purchaser. The company filed CKHT Forms to declare the gain from the two sales as "gain from disposal of fixed asserts" pursuant to the Real Property Gains Tax 1976 and not as "the company's revenue". The Inland Revenue Board (KPHDN) however disagreed and raised additional assessment on tax payable and penalty. The company's appeal to the Special Commissioners of Income Tax (SCIT) was partially allowed

On further appeal by way of Case Stated, the High Court disagreed with the decision of the SCIT and allowed the KPHDN's appeal. The gains received from the disposal of the land was held to be a business income taxable under s.4(a) of the Income Tax Act 1967 (ITA). The transactions constitute adventure in the nature of trade on several grounds.

The subject matter was a plot of land which had not yielded any income since its acquisition. A property which does not yield income or personal enjoyment to its owner by virtue of its ownership, and which is normally the subject of trading and rarely the subject of investments, is more likely to have been acquired for the purpose of resale at profit than the property which does yield such income or enjoyment[ii].

The intention of the company was to gain profit from the disposal of the land rather than for investment. Alteration had been made to the land before its disposal to make it more saleable such as the division of the lot and application for planning permission. Such action tend to indicate that the land was derived from a profit-making undertaking.

Frequency of disposals (2 agreements with 2 different purchasers) suggested that the transactions were made for the purpose of

[i] [2023] 3 CLJ 558

[ii] See *NYF Realty Sdn Bhd v Comptroller of Inland Revenue* [1974] 1 MLJ 182

trading to gain profits. The financial position of the company at the time of acquisition of the land showed that it had the intention to trade and to re-sell the land at a profit at the appropriate time.

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TORT

BIG SUM OF DAMAGES FOR MEDICAL NEGLIGENCE CAUSING IRREVERSIBLE BRAIN DAMAGE

In the medical negligence case of *Yusnita Johari v Dr Jerilee Mariam Khong & Ors*[i], 16 doctors and nurses were sued together with the Government of Malaysia which owned and managed Hospital Sultanah Aminah Johor Bahru for negligence and breach of contract for injuries and losses suffered by the Plaintiff (P) as a result of mistreatment and mismanagement following an emergency Caesarean section performed on P for the delivery of her baby. The trial Judge held that the multi-disciplinary team consisting of the obstetric and anaesthetic team (5 doctors/defendants) and the ICU team (3 doctors/defendants) had failed to act without delay upon ominous signs and to adequately monitor P's condition resulting in P suffering oxygen deprivation and severe bleeding which led to serious brain damage. The various acts of negligence were, among others, inadequate documentation and under-estimation of blood loss and monitoring of P's vital signs, failure to bring down temperature to normal, failure to correct the lactate acidosis, premature withdrawal of sedation, unnecessary use of PEEP and excessive doses of adrenaline and noradrenaline. The Government was liable for breach of a non-delegable duty of care as a provider of healthcare for organizational and system failures.

In awarding special damages for the pre-action period (23 months)[ii], the trial Judge acknowledged the difficulties of P's husband faced in keeping copies of all bills and receipts and hence allowed credible oral evidence to prove hospital and medical expenses, travelling and accommodation expenses, cost of nutritional supplements, special foods and vitamins, cost of traditional massage therapy, cost of diapers, wipes and creams and other personal care items, cost of appliances, equipment and special clothing and cost of obtaining copies of medical records. Damages were also granted for the value/cost of care given to P by family members. The total award was RM289,039.30.

Special damages were also awarded for several items in respect of the pre-trial period (63 months)[iii]. The total award for Pre-Trial damages came up to RM459,900.00.

For future general damages to compensate P's post-judgment loss, multiplier based on the life expectancy of P was calculated at 25 years less the 3 years P had survived so far and a further 15% for the contingencies and vicissitudes of life amounting to 19 years. A total of 34 items were allowed totaling RM3,348,889.60.

[i] [2023] 4 MLRH 263

[ii] Period from the date of cause of action until the date of filing of the legal suit.

[iii] Period from the date of filing of the suit until the date of the decision.

P was also awarded damages for future loss of earnings in the sum of RM206,400.00 and for pain and suffering from brain damage and loss of amenities of life in the sum of RM400,000.00. It was opined that P had had an appreciation of the joys of life, childhood, marriage, motherhood and successful vocation whilst the defendants' negligence had deprived her of all such joys. Her loss of amenities of life was thus far more than that of an infant who had suffered brain damage at birth.

Legal costs of RM354,682.47 were allowed. In total, the damages and costs amounted to RM4,852,511.30.

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TORT

DUTY OF CARE OWED TO CUSTOMERS AS INVITEES – PREVENTING UNUSUAL DANGER

Occupier's liability is the focal point in *Yap Ah Chye v Bei Zhan Restaurant Sdn Bhd*[i], an appeal at the High Court, Melaka. P, an 80 years old man, was a customer who had visited a restaurant operated, occupied and owned by D. Whilst using the stairs in front of the main entrance in order to enter the restaurant, and as he moved from the second step to the third step, P fell to the ground and fractured his right arm. D had admitted that the risers of the stairs were uneven.

The appellate judge overturned the decision of the Magistrate who had dismissed P's claim. D's express admission and the plain visibility of unevenness through inspection of the photographs of the stairs were sufficient evidence without having to call experts to prove the fact. In all probabilities, P slipped because the unevenness of the height of the risers caused him to misjudge his step and to lose his balance and fall backwards when he was stepping up from the second to the third step.

Applying the common law which categorized the type of visitors to a premise into 4 distinct groups[ii], P had entered the premises on business of interest as an "invitee". Under this category, D as the occupier owes a duty to P to use reasonable care to prevent damage from unusual danger which D knows or ought to know; and where there is evidence of neglect, the question whether such reasonable care has been

[i] [2023] 5 CLJ 154

[ii] See *Datuk Bandar Dewan Bandaraya Kuala Lumpur v Ong Kok Peng & Anor* [1993] 3 CLJ 205

taken, by notice, lighting, guarding or otherwise, is to be determined.

On the facts, the unevenness of the stairs was a danger that was unusual because it was brought about by the sinking of the reclaimed land where the premises was constructed on. It was a condition which had been continuing for five years prior to the mishap and that clearly presented a risk to customers that must be prevented. And D had control over the stairs which was at the walkway outside the walls of the premises but was directly connected to the building.

The fact that the local authorities did not raise any objection on the condition of the stairs by continuing to issue renewals of D's business license at the premises did not serve to exempt D's duty of care. D had the duty to post warnings or notices such as affixing luminous stickers at the risers to warn invitees of the uneven height of the risers and to install hand railings to assist invitees to ascend the stairs. A visitor's familiarity with a premises did not negate the duty on the occupier to use reasonable care to prevent damage from unusual dangers. Notwithstanding P had frequented the restaurant on many occasions, it did not exempt D from the general duty of care owed to its customers as invitees.

Nonetheless, P was not without blame. Whilst he claimed to be fit and healthy, he had chosen to use the stairs knowing its uneven condition. It was common knowledge that healthy and safety risks increased with age, more so for octogenarians. Such risks included one's ability to maintain balance and mobility when ascending uneven surfaces. P therefore owed himself the duty to prevent any risks of falling whilst using the stairs by getting assistance of others to safely ascend the stairs or, alternatively, use the ramp meant for those using wheelchairs. P was contributorily negligent for the fall and injuries. Liability was apportioned between P and D on a 70:30 basis.

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